UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

KIMBERLY SLIKER,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 00-196-P-C***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the question whether substantial evidence in the record supports the commissioner's determination that the plaintiff's condition had improved sufficiently to justify cessation of benefits. I recommend that the decision of the commissioner be affirmed.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff was determined to be disabled beginning September 15, 1988, Finding 1, Record at 22; that she currently had a history of asthma and chronic obstructive lung disease, a history of substance abuse, a personality disorder and a

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on December 1, 2000, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

somatization disorder, Finding 2, *id*.; that she currently did not have an impairment or combination of impairments meeting or equaling those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 3, *id*.; that impairments present as of March 29, 1991, the date on which the plaintiff was found disabled, were a somatization disorder, borderline personality disorder, substance addiction disorder and peptic ulcer disease, Finding 4, *id*.; that since March 29, 1991 her medical impairments had improved, Finding 5, *id*.; that this medical improvement was related to her ability to work, Finding 6, *id*.; that the plaintiff currently had a severe impairment or combination of impairments, Finding 7, *id*.; that her assertions concerning her impairments and their impact on her ability to work were not credible in light of the degree of medical treatment required and information contained in the documentary reports, Finding 8, *id*.; that she was unable to perform past relevant work, Finding 10, *id*. at 23; that given her exertional capacity for light work, her age (35), education (limited) and work experience (semi-skilled), application of Rules 202.17 and 202.18 of Table 2, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid"), directed a conclusion that she was not disabled, Findings 12-15, *id*.; that, considering her additional nonexertional limitations within the framework of the above-cited rules, she could make a successful vocational adjustment to work that existed in significant numbers in the national economy, Finding 16, *id*.; and that her disability ceased on June 30, 1997, Finding 17, *id*. The Appeals Council declined to review the decision, *id*. at 5-6, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981; 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(f), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs*., 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be

supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

Termination of benefits is governed by 42 U.S.C. § 423(f), which provides in relevant part that benefits may be discontinued only if (i) there is substantial evidence to support a finding of medical improvement related to an individual's ability to work and (ii) the individual is now able to engage in substantial gainful activity. *Id*., *see also* 20 C.F.R. §§ 404.1594(a), 416.994(a). Medical improvement "is defined as any decrease in the medical severity of an impairment, and any such decrease must be based on changes in the symptoms, signs and/or laboratory findings associated with the claimant's impairment." *Rice v. Chater*, 86 F.3d 1, 2 (1st Cir. 1996) (citations and internal quotation marks omitted); *see also* 20 C.F.R. §§ 404.1594(b)(1), 416.994(b)(1)(i). "To find medical improvement, the Commissioner must compare the prior and current medical evidence to determine whether there have been any such changes in the signs, symptoms and laboratory findings associated with the claimant's impairment." *Rice*, 86 F.3d at 2; *see also* 20 C.F.R. §§ 404.1594(c)(1), 416.994(b)(2)(i). "Once medical improvement *has been shown*, a claimant's failure to meet a prior listing suffices to show that medical improvement *is related to ability to work*, a separate issue which is not even considered until medical improvement has been established." *Rice*, 86 F.3d at 2 n.2 (emphasis in original); *see also* 20 C.F.R. §§ 404.1594(c)(2) & (3)(i), 416.994(b)(2)(ii)-(iv). Failure to seek treatment is not evidence of medical improvement. *Rice*, 86 F.3d at 2. The regulations require actual physical improvement in a claimant's impairment, not simply an improved prognosis. *Id*. at 3.

In reassessing the plaintiff's ability to work, the administrative law judge reached Step 5 of the sequential evaluation process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. §§ 404.1520(f),

416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner=s findings regarding the plaintiff=s residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff contends that the administrative law judge (i) erred in concluding that there had been sufficient improvement in her personality and somatoform disorders to permit her to work, (ii) failed to develop the record adequately and (iii) made an unsupported credibility finding. *See generally* Statement of Errors (Docket No. 6). None of these contentions has merit.

I. Discussion

A. Medical Improvement/Ability To Work

The plaintiff challenges the administrative law judge's finding that her mental condition had improved sufficiently to permit her to work primarily on the basis that (i) the record contains only one post-1991 mental residual functional capacity ("MRFC") assessment by an examining consultant (Dr. Garnett), and (ii) the vocational expert present at hearing testified that a person with the MRFC limitations found by Dr. Garnett could not perform substantial gainful activity. Statement of Errors at [1]-[5].[2]

There are in fact two additional post-1991 MRFC assessments, by Peter G. Allen, Ph.D. and Ake Akerberg, M.D. *See* Record pp. 368-69, 384. In alluding to the Allen assessment, the plaintiff suggests that "[t]he other DDS reviewer concludes that her impairments are moderately severe (R.

[2] The plaintiff notes that the Garnett MRFC consciously factored out any limiting effects attributable to her alcohol use. Statement of Errors at [3]. Effective March 29, 1996 Congress eliminated alcoholism and drug addiction as bases for obtaining SSI or SSD benefits. *See* 42 U.S.C. ' 1382c(a)(3)(J) ("an individual shall not be considered to be disabled for purposes of this subchapter if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner=s determination that the individual is disabled."); *Adams v. Apfel*, 149 F.3d 844, 845 (8th Cir. 1998) (noting effective date of change).
(*continued on next page*)

360) and would limit her in ways similar to those expressed by Dr. Garnett (R. 368, 369)." Statement of Errors at [4]-[5]. Although Drs. Allen and Garnett used different versions of MRFC forms, making side-by-side comparison difficult, it is noteworthy that Dr. Allen found no significant limitation in fourteen of twenty categories of mental function. Record at 368-69.[3] Although Dr. Akerberg did not complete a detailed MRFC form, he concluded that in the absence of effects of the plaintiff's alcoholism she would have no restrictions of activities of daily living, and slight difficulties in maintaining social functioning and would seldom have deficiencies of concentration, persistence or pace. *Id*. at 384.

Inasmuch as appears, both Drs. Akerberg and Allen were non-examining consultants, a factor that normally lessens the weight that a consultant's judgment should be accorded. *See* 20 C.F.R. §§ 404.1527(d)(1), 416.927(d)(1) ("Generally, we give more weight to the opinion of a source who has examined you than to the opinion of a source who has not examined you."). However, the administrative law judge had in addition the benefit of a further consultative examination by Ann H. Crockett, Ph.D. *See* Record at 432-37. Dr. Crockett diagnosed the plaintiff with "mixed personality disorder with borderline and avoidant traits" as well as alcohol, opioid and nicotine dependency, *id.* at 437, and detected mild depression that might or might not be related to alcohol abuse, *id*. at 434-35. However, she concluded: "[H]er social skills today were certainly adequate for handling most work situations. . . . [S]he is considered to be able to handle most work situations if she were motivated,

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[3] For example, Dr. Garnett found the plaintiff moderately limited in relating to co-workers and markedly limited in behaving in an emotionally stable manner, relating predictably in social situations and demonstrating reliability. Record at 423-24. Dr. Allen found no significant limitation in (i) ability to get along with coworkers or peers without distracting them or exhibiting behavioral extremes, (ii) ability to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances, (iii) ability to work in coordination with or proximity to others without being distracted by them, (iv) ability to maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness and (v) ability to respond appropriately to changes in the work setting. *Id.* at 368-69.

(*continued on next page*)

sober, and straight." *Id*. at 437.[4] In addition, Paul Stucki, M.D. examined the plaintiff on October 30, 1996. *See id*. at 426-30. While this examination focused on physical findings, Dr. Stucki noted that her somatization disorder was "[a]pparently essentially or totally absent when she is sober" and that, with respect to her personality disorder, "I get the impression that this too is not really a problem if she is able to stay sober." *Id*. at 426. This apparently was based on the plaintiff's own self-report that "she had few 'other' (non-alcoholic) complaints. She states when she is sober, she eats well, exercises well, functions normally daily, etc." *Id*. at 430.

This was at bottom a classic situation in which the administrative law judge confronted conflicting evidence as to the degree of incapacity imposed by the plaintiff's mental impairments with the effects of alcohol and drug use factored out. Although Dr. Garnett did indeed rate the degree of impairment under those circumstances moderate, Dr. Akeberg rated it mild. The narrative report of Dr. Crockett, as well as Dr. Stucki's comments, largely align with the Akeberg assessment. The administrative law judge was entitled to resolve these conflicts in favor of a finding of slight impairment. *See Rodriguez*, 647 F.2d at 222 ("The Secretary may (and, under his regulations, must) take medical evidence. But the resolution of conflicts in the evidence and the determination of the ultimate question of disability is for him, not for the doctors or for the courts.").[5]

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[4] In her Statement of Errors, the plaintiff also asserted that Dr. Crockett failed to complete an obligatory MRFC form, a proposition for which she cited 20 C.F.R. § 416.919n(c)(6). Statement of Errors at [2]. In fact, the regulation makes clear that "the absence of such a statement in a consultative examination report will not make the report incomplete." 20 C.F.R. § 416.919n(c)(6); *see also* 20 C.F.R. § 404.1519n(c)(6). The plaintiff's counsel conceded at oral argument that Dr. Crockett's failure to complete an MRFC form was not reversible error.

[5] The plaintiff acknowledges that "[u]nder some circumstances one might argue that the DDS evaluation by Dr. Akerberg gives creates [sic] a basis on which the ALJ might rest her opinion since he indicates her problems are non-severe." Statement of Errors at [4]. "However, Dr. Akerberg . . . also expressly notes that in his opinion there has been no medical improvement." *Id*. While this is indeed the case, *see* Record at 376, there is other evidence of record of improvement, including the assessment of Dr. Allen that "DDS twice rated her impairment as severe but denied claim . . . . Currently, new CE (DOE 5/20/96) rated her [with] only [alcohol] (*continued on next page*)

B. Development of Record

The plaintiff next contends that, in view of Dr. Garnett's finding of significant limitations on MRFC and the lack of any other MRFC assessment based on actual examination, the administrative law judge was obligated at a minimum to develop the issue further, *i.e.*, by using a medical advisor at the hearing or requesting that Dr. Crockett complete an MRFC form. Statement of Errors at [5]-[6]. As the First Circuit has explained:

> In most instances, where appellant himself fails to establish a sufficient claim of disability, the Secretary need proceed no further. Due to the non-adversarial nature of disability determination proceedings, however, the Secretary has recognized that she has certain responsibilities with regard to the development of evidence and we believe this responsibility increases in cases where the appellant is unrepresented, where the claim itself seems on its face to be substantial, where there are gaps in the evidence necessary to a reasoned evaluation of the claim, and where it is within the power of the administrative law judge, without undue effort, to see that the gaps are somewhat filled as by ordering easily obtained further or more complete reports or requesting further assistance from a social worker or psychiatrist or key witness.

Heggarty v. Sullivan, 947 F.2d 990, 997 (1st Cir. 1991) (citation and internal quotation marks omitted).

Although the completion of an MRFC form by Dr. Crockett would indeed have been helpful, the record in this case was adequately developed as a matter of law. First and foremost, the plaintiff was represented at hearing by counsel, removing this case from the ambit of those in which the commissioner can be said to have a heightened duty of record development. Second, the administrative law judge had the benefit of the post-1991 reports of two examining consultants and two non-examining consultants on the issue of the status of the plaintiff's mental impairments with drug

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dependence as DX (r/o PTSD) . . . . Recent telephone contact indicated recent (7-wk) sobriety [with] no somatoform component." (*continued on next page*)

and alcohol use factored out. The plaintiff in addition provided a report by an examining consultant, Frank Luongo, Ph.D. *See* Record at 549-53. There were no "gaps in the evidence necessary to a reasoned evaluation of the claim" of the sort contemplated in *Heggarty*.

C. Credibility Determination

The plaintiff finally asserts that her somatoform disorder (which by its very nature entails "[u]nrealistic interpretation of physical signs or sensations") was improperly used to make an adverse credibility finding against her. Statement of Errors at [6]-[8]. The point that an administrative law judge could confuse somatoform symptomology with malingering is well-taken. However, in this case the administrative law judge noted — and the plaintiff does not dispute — that treatment records from 1st Care Health Center did not depict debilitating restrictions caused by mental illness. *See* Record at 20; Statement of Errors at [4]. In addition, and while not mentioned by the administrative law judge, the plaintiff herself evidently reported a near cessation of physical symptomology when sober. *See* Record at 417 (reported statement to Dr. Garnett that "any time that she stopped drinking, the physical symptoms would 'go away' except for residual right lower quadrant pain"), 430 (report of Dr. Stucki that "she had few 'other' (non-alcoholic) complaints").

An administrative law judge may resolve conflicts in the evidence (*e.g.*, between a claimant's allegations at hearing and his or her reported statements to treating physicians) against the claimant. *See, e.g., Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987) ("The credibility determination by the ALJ, who observed the claimant, evaluated his demeanor, and considered how that testimony fit in with the rest of the evidence, is entitled to deference, especially when supported by specific findings.").

Id. at 360.

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **AFFIRMED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 4th day of December, 2000.

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David M. Cohen
United States Magistrate Judge

ADMIN

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-196

SLIKER v. SOCIAL SECURITY, COM Filed: 07/03/00
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